SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF OF PETITIONER.

Opinion Below.

The opinion of the Court of Claims (R. 37-40) has not yet been reported.

The Question Involved.

The only question involved in this proceeding is whether the Court of Claims was correct in holding that Section 154 of the Judicial Code (U. S. Code, Title 28, Sec. 260) deprived it of jurisdiction to hear the cause by reason of the fact that after the commencement of the action in the Court of Claims suits

were instituted against the United States in the District Court upon the same causes of action.

Statement of the Case.

This action was commenced in the Court of Claims on April 6, 1927, to recover from the United States the unpaid balance of an open, current, mutual and running account.

Acting pursuant to the Urgent Deficiencies Appropriation Act of June 15, 1917, the United States Shipping Board (which we shall hereinafter refer to as the Board) on October 15, 1917, requisitioned seven of the Matson Navigation Company's vessels for use by the Government (R. 3).

On December 29, 1917, the Matson Navigation Company and the United States entered into agreements, for the purpose of fixing a standard for the determination of the just compensation to which the owner was entitled while the vessels were in the service of the United States under requisition (R. 15). At a later date the United States appointed the Matson Company as its agent (R. 9) to husband, manage and operate various vessels of the United States.

Throughout the period of time that the Matson Company acted as the Government's agent and the time during which the vessels were under requisition, an open, mutual, current and running account was maintained between the parties, in which the United States was credited with sums received for its account by the Matson Company and was charged with the sums becoming due to the Matson Company from time to time as reasonable compensation for the use of the vessels and

also with various other sums disbursed by the Matson Company for the Government's account (R. 10-11). After negotiation the account was finally settled on October 18, 1926. At that time the United States paid the balance of the account excepting the sum of $49,373.11, which represented credits to the Matson Company which the Board decided had been improperly allowed.

This sum was measured by certain increased wages and bonuses over the standard prevailing August 1, 1917, which had been paid by the Matson Company to the master, officers and crew of each requisitioned vessel and was claimed by the Matson Company as a part of the just compensation fixed by the agreements.

A settlement agreement was entered into between the parties which reserved to the Matson Company its right to sue for the balance of $49,373.11, which it claimed (R. 32).

This proceeding was commenced on April 6, 1927, in the Court of Claims (R. 7) to recover the disputed balance. On the following day the Matson Company filed in the United States District Court for the Northern District of California, Southern Division, seven actions in which recovery of the amounts due under these contracts in respect of each vessel was sought, with the exception that in each of the cases the amounts were reduced to $10,000 in order to come within the jurisdiction of the District Court (R. 36).

Error Intended to be Urged.

The Court of Claims dismissed the cause upon the sole ground that by reason of the pendency of the ac-

tions in the District Court it was deprived of jurisdiction under the provisions of Section 154 of the Judicial Code. This statute deprives the Court of Claims of jurisdiction only where another action is pending—

> "against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

It does not deprive the Court of Claims of jurisdiction where other actions are pending against the United States itself. Such actions are to be disposed of in accordance with the usual rules respecting abatement of actions where other actions are pending between the same parties for the same cause.

ARGUMENT.

The Statute in Terms is Inapplicable to the Present Case.

The Statute upon which the Court of Claims solely relied in its opinion is as follows:

> "No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."
>
> Sec. 154 of Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260).

This statute deprives the Court of Claims of jurisdiction only where another action is pending against "any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States." Nothing is there said in respect of another action pending against the United States itself, as to which a plea in abatement is available.

The Court of Claims cited *Corona Coal Co.* v. *United States,* 263 U. S. 537, 540, to support its view that a suit could not be prosecuted before it while suits against the United States upon the same claim are pending in the District Court. But in the *Corona* case the plaintiff had commenced an action in the District Court against the Director General of Railroads while an appeal from the Court of Claims in respect of the same matter was pending. The Government's motion to dismiss the appeal because of the provisions of Section 154 of the Judicial Code was granted, the court saying:

> "At the time the alleged causes of action arose the President was acting under the authority of the United States, and the actions, being against an agent appointed by and acting for him, fall within the terms of the statute just quoted. It is urged, however, that the actions were brought *ex necessitate rei,* because they were about to become barred by expiration of the statutory period of limitation, and that, for this and other reasons, the case is not within the spirit of Section 154, properly construed. But the words of the statute are plain, with nothing in the con-

> text to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

The *Corona* case does not support the statement made by the Court of Claims. On the contrary, the court found the statute to be applicable, the second action "being against an agent appointed by and acting for him (the President)."

In not a single instance has this statute been held applicable where two cases are brought against the United States itself. The Court of Claims itself has not applied the statute where two cases are pending against the United States upon the same cause.

In *Peterson* v. *United States*, 26 Ct. of Cl. 93, an action was brought in the Court of Claims, although a prior action involving the same issues had been instituted in the District Court. The action was not dismissed, but was abated pending determination of the litigation in the District Court. That is the course which should be pursued in the District Court in the present instance. This action having been first commenced, should proceed and the actions in the District Court should abate pending this determination.

In the *Corona Coal* case this Court said, in respect of Section 154 of the Judicial Code:

> "* * * the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

Since the language of the statute is plain and "no room is left for construction" to add an exception to the act to avoid hardship in particular cases, we submit that the same language leaves no room for an extension of the statute to impose a hardship in this case.

Expressio Unius est Exclusio Alterius.

While the plain meaning of the language used in the statute precludes any resort to rules of statutory construction, if any such rule might be resorted to, it is that of "*expressio unius est exclusio alterius.*"

Colyer v. *Skiffington*, 265 Fed. 17, 45;
Johnson v. *Southern Pac. Co.*, 117 Fed. 462, 465.

Section 154 of the Judicial Code particularly specifies the conditions upon which it shall apply to a suit in the Court of Claims, to wit: the pendency of another suit against an agent of the government upon the same cause. It impliedly excludes all other conditions, including the pendency of a suit against the United States itself.

The Statute Cannot be Extended by Implication.

The Act creating the Court of Claims (10 Stats. L. 612, Ch. 122) vested it with general jurisdiction of claims against the United States. Section 154 of the Judicial Code is a restriction upon that jurisdiction under particular circumstances. It is in derogation of the statute vesting the Court of Claims with jurisdiction in actions such as here involved and its scope is not therefore to be extended by implication beyond

its clear terms. Particularly is this true where, as in this case, the statute would be applied in a situation not within possible contemplation when the statute was enacted.

United States v. *Barnes*, 222 U. S. 513, 520.

The History of the Act Shows That Congress Did Not Intend That it Should Apply to the Situation Here Presented.

While we still believe that the language of the statute is so clear that "no room is left for construction," nevertheless, if the situation were otherwise and if the statute requires extrinsic aid for interpretation, the debates in Congress show that the act is inapplicable in the present situation.

In explaining the purpose of the bill which was enacted in 1868 (15 Stats. L. 77) and which subsequently became Section 154 of the Judicial Code, Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, said:

> "The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country, here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law then can turn around and try the whole question in the Court of Claims. The object is to put that

class of persons to their election either to leave the Court of Claims, or to leave the other courts. I am sure everybody will agree to that."

Congressional Globe, Second Session, 40th Congress, 1867, 1868, p. 2769.

The bill was adopted without further discussion in Congress.

The statute was directly aimed at the practice of simultaneously maintaining an action against the United States and an action against its agents or officers in connection with the same grievance.

At the time the statute was enacted the only jurisdiction over suits against the United States was in the Court of Claims, and it was not until 1887 that the Tucker Act (24 Stats. L. 505, Ch. 359, Secs. 1 and 2) gave concurrent jurisdiction to the District Courts in respect of certain actions against the United States. The statute, therefore, could not possibly have been intended to apply to a case where two actions against the United States itself were pending in different courts.

It is apparent, therefore, that the purpose and policy of the Act was to compel an election between two different remedies and not to compel an election between two different forums in which the same action might be prosecuted against the United States.

The plain language of the statute, which leaves no possible room for the construction given thereto by the Court of Claims, aptly expresses the sole intent and purpose disclosed by the history of the act.

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No Reason Exists for Applying Section 154 of the Judicial Code to the Situation Here Present.

While the statute is plain and permits no resort to rules of construction, no reason exists to apply the statute to the present situation.

The Court of Claims incorrectly assumed that if it is deprived of jurisdiction while a suit is pending on the same cause of action in another court against one who acted or claimed to act under the authority of the United States, *a fortiori* it is deprived of jurisdiction where a suit was pending against the United States on the same cause in another court. In support of this assumption the Court of Claims stated that in such a case the Government must defend the suit in two jurisdictions and that the aim of the statute was to prevent two trials of the same cause in separate jurisdictions (R. 39).

But the pendency of two suits against the United States itself upon the same cause in different forms does not require two trials of the cause.

While an action by a private individual against an agent of the United States is not a bar in a subsequent action by the United States against the same individual involving the same subject-matter (*Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. (16 Otto) 196; *Tindal* v. *Wesley*, 167 U. S. 204), and a judgment in favor of a litigant against an agent of the United States is not a bar to an action by the same suitor against the United States itself (*Sage* v. *United States*, 250 U. S. 33), a judgment in an action between the United States and any other party creates a bar

by estoppel in any subsequent proceeding between the United States and the same party involving the same issues.

Southern Pacific R. R. v. *United States,* 168 U. S. 1.

In the Court of Claims a judgment of the District Court in an action between a claimant and the United States has always been regarded as *res adjudicata* in an action upon the same claim in the Court of Claims.

LeMore & Co. v. *United States,* 32 Ct. Cl. 9.
Rymarkiewicz v. *United States,* 42 Ct. Cl. 1.
Hartiens v. *United States,* 42 Ct. Cl. 42.

In view of these rules it is evident that a definite reason existed for the adoption of the Act constituting Section 154 of the Judicial Code. It was entirely appropriate that any claimant desiring to avail himself of permission to sue the Government should be denied the right to prosecute at the same time an action upon the same subject-matter against the agent of the Government, and thereby in effect oblige the Government to try twice the issues involved. Since, however, the judgment in any action against the United States bars any subsequent action upon the same claim, the existence of more than one action against the United States upon the same claim creates no risk of a double defense against the claim, and there is no occasion to apply the rule of Section 154 of the Judicial Code.

It thus becomes apparent that the pendency of two suits against the United States on the same cause in separate jurisdictions and the pendency of a suit in

one jurisdiction against the United States and in another jurisdiction against its agent upon the same cause, present entirely different situations and a rule properly applicable in the latter case does not *a fortiori* apply to the former; on the contrary entirely different rules are applicable to the two situations. Appropriate procedure has always been available to protect the United States against any embarrassment arising out of the maintenance of two actions against it involving the same subject-matter.

It frequently happens, that, out of an excess of caution, suits involving the same subject-matter and the same parties are commenced in two or more courts which have jurisdiction. In such a situation it is well established that the second action may be abated pending the determination of the first. The second action is not thereby dismissed, but remains in abeyance pending a final judgment in the first action; and when judgment is rendered in the first, it is *res adjudicata* as to the abated action or any subsequent action between the same parties. Such is the proper course for the United States to pursue in this proceeding. The action in the Court of Claims was the first action commenced. The actions subsequently commenced in the District Court in California may be abated pending the determination of the action in the Court of Claims. In this way the rights of both parties are protected, the plaintiff is enabled to obtain a decision of its case on the merits, and the Government is not subject to the trouble or expense of twice defending the same claim.

In the Court of Claims it is possible to try the entire matter in dispute in a single action. Trial of these issues in the District Court would involve a separate trial as to each vessel involved.

The merits of the claim have already been determined adversely to the Government in *New York and Porto Rico S. S. Co.* v. *United States*, 29 Fed. (2d) 1013, affirmed by the Circuit Court of Appeals in 29 Fed. (2d) 1014.

Conclusion.

It is respectfully submitted that the record presents but one question, whether the Court of Claims properly dismissed the action for lack of jurisdiction under the provisions of Section 154 of the Judicial Code. It is submitted that in this respect the Court of Claims erred, because:

(1) The statute by its clear terms requires such dismissal only where the other action is pending against a person acting for or on behalf of the United States in respect of the same subject-matter, and does not apply to another action pending against the United States itself;

(2) The purpose of the statute was to avoid a multiplicity of actions where the judgment in one could not be pleaded in bar of the other, and where one of the actions was not subject to abatement during the pendency of the other, a situation not present in the instant case;

(3) The history of the legislation shows that it was intended only to prevent the simultaneous maintenance

of a suit against the Government's agent and a suit against the United States itself, and was not intended to apply to separate suits against the United States, as to which the ordinary rules of *res adjudicata* and of abatement of actions amply protect the Government.

It is respectfully submitted that the judgment should be reversed.

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Attorneys for Petitioner.

M. A. CRAM,
WILLIAM G. FEELY,
Of Counsel.